Judges
James E. Sheridan
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Lenawee County
1st Division

STATE OF MICHIGAN

DISTRICT COURT

2A DISTRICT

425 N. Main St.
Adrian, Mi. 49221-2199

Criminal 264-4673
Civil 264-4661
Probation 264-4681

September 29, 2009

Michigan Supreme Court
Clerk's Office
PO Box 30052
Lansing, MI 48909

Re: Comment on Proposed Amendment to MCR 6.302(C)(1) Voluntary Plea

To the Clerk of the Supreme Court

The proposed language would add the following wording to MCR 6.302(C)(1):

> All discussions regarding a defendant's plea must take place in open court and be placed on the record.

We strongly oppose the adoption of this language. We do so for the following reasons.

1. A great deal of discussion regarding potential plea agreements on felonies take place in District Court at or prior to the Preliminary Examination. We have surveyed our prosecutors and the attorneys who do most of the felony work. While the time required for discussion appears to vary widely, the average is roughly 15 minutes spent in discussion between the prosecutor and the defense attorney per case regarding potential plea agreements. This all takes place in District Court. The results of the discussion heavily influence whether there will be preliminary examination, a waiver of exam, or a plea to a misdemeanor as a plea agreement.

In the 2A District Court we have approximately 28 defendants in court every week for Preliminary Examinations. (The actual count for the period of May 1st through August 31st was 482.) If "all discussions regarding a defendant's plea" is done in open court and on the record, we would require over 7 hours of on-the-record, in-court time for such discussions every week. This would be in addition to the 3 hours currently spent.

If a specific case requires a full exam, we set it for a day certain. On our examination afternoon, the judge is in court putting examination waivers and guilty pleas to reduced charges on the record while the prosecutors talk to other attorneys about other cases. If "all discussions" have to be in open court and on the record, it will be impossible for trial judges to use their own courtroom for other matters, while those discussions are taking place. What now requires about 3 hours will jump to 10 hours, which is more than a full day.

In addition to tying up the court room for an extra day per week, we would have to have our court recorder present the entire time, since this is on the record. If there is any "down time" during our preliminary examination afternoon, our court recorder is busy helping get files ready and other administrative matters. This proposal would put a terrible strain on our staff.

The judiciary often talks of "judicial economy." This proposal is remarkably non-economic.

Realistically, however, there are many cases in which the proposed rule change would simply end any possibility of discussion. For example:

A. Situations where the defendant agrees to act as an informant to help further investigations regarding other drug offenders, particularly sellers. Defense attorneys or prosecutors will not be willing to put the discussion on the record. The very act of making the deal public would make the deal un-doable.

B. Situations where the defendant has medical or psychological problems. That may be part of the discussion off the record, but would not be appropriate to put on the record. For example, if the defendant is ill and the defense attorney brings in medical reports to verify the claim, those reports would be part of the public record. The media could then publish all this in the local paper.

C. Efforts made by the defendant (daily AA meetings, seeking substance abuse evaluations, etc.) that are all subject to privacy rules would be part of the public record, and could be published in the local newspaper if they are mentioned in the plea discussion on the record.

D. All the reasons the prosecutor gives for not agreeing to a plea agreement would be public information, including misdemeanor convictions, prior dismissed cases, etc, that would not be admissible in evidence, but, which, can now be published.

2. If there is a Cobbs plea, the court must approve it. But, sometimes approving a Cobbs plea involves talking about issues (again, working undercover or medical issues) that make the Cobbs plea sensible, but which should not be on the record. We have had situations where a defendant was offered a Cobbs plea of no jail in a possession of marijuana case reduced from possession with intent to deliver. Part of the plea "discussion" involved the court's refusal to follow the no-jail provision of the Cobbs plea, because the defendant had already had a possession case deferred and dismissed under §7411 and had a OUID pled as an "Impaired Driving." This was actually his third time in. None of this would be admissible at trial, but it would be available for the press to put on the front page.

3. Since judges and prosecutors are elected, there is always the danger of needless public posturing shortly before elections, to impress the public rather than to make sure justice is done.

4. Some of the discussions between prosecutor and defense may also include review of evidence and talking about trial strategy. These are matters that should not be available to the public on all occasions, especially since some of the evidence may prove to be inadmissible. Moreover, if the prosecutor or defense attorney refers to the police report in the course of the discussion, it would appear the entire police report then become part of the discussion, since it is the basis of the discussion. If so, that means the entire police report is also open to public printing and comment in the local newspaper.

5. In any case where a gag order is entered, i.e prohibiting the parties from commenting to the press, either side could, in effect, circumvent the gag order by invoking this rule. Indeed, if there is any meaningful discussion, the gag order would become meaningless. The only difference would be that the press conference would not be in front of the courthouse, it would be in open court and on the record, with both sides working to make their statements fit a 6 second sound-bite to fit the evening news.

6. If the proposal is applied literally, i.e. "All discussions regarding a defendant's plea" (emphasis added) must be in open court and on the record, that would include discussions between the defendant and his attorney. But, that would be a violation of the 6th Amendment right to the effective assistance of counsel and render the attorney / client privilege meaningless.

7. A literal application of the phrase "all discussions regarding a defendant's plea" also raises the following concerns:

A. The discussion between the prosecutor and victim and victim's family about possible pleas would have to be on the record. In CSC cases, this could, in effect, undermine the statutory limitations of putting on the record the victim's past sexual experience. Since it would be on the record, the media would have full access and a right to publish.

B. If this discussion with the victim and victim's parents are required to be on the record, at least another 15 minutes per case would have to be on the record. That would make the total time in open court about 17 hours per week in the 2A District Court, not 3.

C. The discussions between the prosecutor and law enforcement regarding possible pleas would have to be on the record. This may also add the risk of revealing the names of confidential informants and effecting possible other cases. More over, if the prosecutor talks to the confidential informant about the possible plea, under this proposal, would that, too, have to be on the record? If so the name of the confidential informant would be no longer confidential.

D. If the phrase "all discussions" is literal, does it also include conversations between two police officers about the plea position they will be pressing the prosecutor to take? This is important, since (1) police officers are part of government and (2) have much to say about what plea agreements will be offered or accepted. If so, there is a real pandora's box of problems that will be created.

8. There is also the issue of enforcement. If the court learns that the attorneys "discussed" the case for 10 seconds in the elevator on the way up to the courtroom, what is the sanction? Is the trial court to hold them both in contempt? Will the attorneys be required to repeat the entire conversation on the record? How can we be sure they didn't leave anything out? Later on, if it is alleged that some discussion was held that was not on the record, what does that do to the plea? Is the plea to be set aside? Worse, yet, if the attorneys request to approach the bench to ask a question of the trial judge at side bar and off the record, it appears that the judge would be in violation of this rule by granting the request. Would this mean that any resulting plea agreement would not be enforceable? Or would the trial judge be subject to sanctions? Or would the media be entitled to an order allowing it to listen in on all future side bars during such discussions?

If the side bar is on an issue of evidence: The parties want to get a feel for how the judge might rule on a particular question. The answer to the question will effect future negotiations. Although this is not directly about a plea bargain, it is closely associated to it. Since the discussion is "regarding" the plea agreement, this, too, would have to be on the record. These conversations currently take place informally, sometimes in the judge's office. With this rule, additional courtroom time, and staff time (court officer, court recorder) would be needed.

We have attached some sample "discussions" to illustrate the problems we envision. We apologize in advance if the tone of these sample discussions are a bit facetious. However, the proposal seems to invite such a wide range of problems, the tone is hard to avoid, in light of the humor inherent in the possibilities.

9. Finally, this proposal will also add to the number of appeals. The issue will be that there were discussions between counsel, or between counsel and the court, that was not on the record and so the plea is void. Even if it is not void, will trial courts be required to hold hearings to determine what was said, and whether it made a difference? If the trial judge was involved in the discussion off the record, would that disqualify that judge from hearing the motion? And, would the trial judge be required to testify at such a hearing? If it becomes a "harmless error" rule, then will the proposed rule ever actually be enforced?

This proposal appears to be a misguided effort to move toward increased "openness" and "transparency" in government. The goal, itself, is worthy. However, this rule takes us into a time consuming quagmire, with very little to show for the journey. The fact that the current rule requires that a plea agreement be put on the record solves much of the problem of hidden deals.

Moreover, if there is concern that "backroom deals" are being made or that certain people are getting special favors, there is another solution. If the court is not satisfied that justice is being served by the plea agreement, there is nothing in the current rules preventing the court from requiring counsel to state the real reasons for the offer on the record in open court.

We urge the Court to reject this proposal. The proposal will needlessly clog the trial court dockets, result in additional motions and appeals, be an enormous waste of resources, and raise a number of serious constitutional issues of the right to the effective assistance of counsel and fair trial.

Thank you for your consideration of this comment.

Yours truly,

James E Sheridan
District Judge

Natalia Koselka
District Judge

We have been authorized by Circuit Judge Timothy Pickard, Circuit Judge Margaret Noe, and Probate Judge Gregg Iddings to add their names to this letter. Therefore, please consider this letter and the attachment to be the position of the entire Lenawee County trial bench.

Attachment A
Potential Court Room "Plea Discussions"
Under the Proposed Amendment to MCR 602(C)(1)

1. The defendant is charged with possession with intent to deliver marijuana. The following discussion takes place on the record.

Defense Lawyer: "My client would like a plea bargain because he is willing to work undercover as a snitch. He has had a long series of dealings with George Smith. Mr. Smith is my client's supplier. My guy will provide you with some very helpful information. If he does that would you be willing to drop this to an Attempt, or perhaps a Possession charge?"

Prosecutor: "Well, we've been trying to catch Mr. George Smith for a long time. We believe he's a major supplier. Would your client be willing to do a controlled buy from Mr. Smith? We'd want him to wear a wire."

Defense Lawyer: "I don't know. Mr. Smith has a reputation of being very violent."

Prosecutor: "That is a problem. But, if you're guy wants a deal, he's going to have to risk it."

What if a friend of Mr. Smith's is in court at this time? Or a journalist decides, in the interest of fairness, to not only publish the story, but to also phone Mr. Smith to get his reaction?

2. The defendant has medical or psychological problems. That may be an appropriate part of the discussion off the record, but would it be appropriate to put on the record?

Defense Lawyer: "My client is very ill. Here, look at the medical reports. He has late stage prostate cancer, cirrhosis of the liver and is HIV positive."

Prosecutor: (After looking over the medical reports) "Sure, why not? We'll offer him a 10 year max. He'll die in prison anyway."

Since the medical reports are now part of the discussion about the plea agreement, they are open to the public. The media would have a right to not only see the medical reports, but have copies, and publish them.

Or worse yet, consider the defendant with emotional problems:

Defense Lawyer: "My client is suicidal. The reason he was driving that way was really an attempt to kill himself. Here, I have the psychiatrist's report. My client is so near the edge that if he is even approached on this, he may go over the edge and try to kill himself again."

Prosecutor: (After reviewing the reports.) "I see what you're talking about. You're right. He was charged with Fleeing and Eluding, but, with this report, we really need to work something out. What do you have in mind?"

Defense Lawyer: "We'd like an attempted. That would be a one year max, so the Court would have a lot of control, and the family has already started looking at possibly hospital placements that might help."

We had a case similar to this a number of years ago. However, here again, if this is all put on the front page of the local paper or plastered all over the web, the results would be devastating.

3. There is also the issue of fair trials. Consider the following on the record:

Defense Attorney: "My client would be willing to plead to use of cocaine, but certainly not possession with intent to deliver."

Prosecutor: "I'm not offering use. It's straight up to possession with intent to deliver, or we go to trial."

Defense Attorney: "This is crazy! Why won't you give my guy a break? A one year misdemeanor use conviction will give you everything you need."

Prosecutor: "A break?! He already had a pot charge expunged under 7411, and the other pot charge we dismissed when he plead to the those four retail fraud cases last year. He's been stealing stuff to pay for his drug habit.

"And, let's not forget when he got busted for that domestic violence charge last spring, there was pot all over the place. We knew it was all his, we just couldn't prove it. Then we ended up having to drop the DV, too, because his girlfriend changed her story.

"Now it's coke. Remember last fall when we gave him a heck of a break and let him plead to driving with an unlawful substance in his system? Well, that was a plea down from a coke possession charge. He's had his break. Besides the police keep getting anonymous calls saying your guy is one of the biggest drug dealers in the county. Your guy's got some serious problems and I'm not giving anything."

Defense Attorney: "Sure he's got drug-addiction problems but, you know there is a real problem with the validity of the search."

Prosecutor: "The search! You've got to be kidding. It was a consent search of the livingroom."

Defense Attorney: "Consent! That was from my client's son. He's only 16 for Pete's sake. And, besides he was high on marijuana when he let the cops in."

Prosecutor: "He's old enough to give consent. Besides, we've had three separate anonymous calls saying that the kid got the marijuana from your client, his own father! Your client's not only a drug dealer, he's getting his own kid hooked. No deal."

The local newspaper has a reporter in the audience. The next day the following article appears:

> "It was learned yesterday that Mr. Smith, charged with possession of cocaine with intent to deliver, has been charged twice before for possession of marijuana. He's also previously been caught with cocaine. His attorney admits that Mr. Smith has major addiction and apparently has committed at least four thefts to pay for his drug habit. His attorney, in effect, admitted his guilt in open court. Moreover, the police have reports that Mr. Smith has been supplying his own son with marijuana. Amazingly, Mr. Smith is still insisting on a trial."

Everything in the article is correct, but much of it would be inadmissible in court. Would there now be a motion for change of venue? And, what about the statements in open court about a juvenile? Juvenile records are not supposed to be open to the public. This boy's could be on the front page.

4. There is also the privacy issue of the victim. Consider a case where the defendant is charged with rape. The statute prohibits testimony about the background of the victim. But, realistically the background sometimes sneaks into plea discussions.

Defense Attorney: "My client would be willing to plead to a 3rd degree, but, no way on a 1st."

Prosecutor: "This was forcible rape. He drugged her and tied her up before he did it."

Defense Attorney: "Give me a break. Your victim is no angel. I think I may be the only guy east of the Mississippi she's not had sex with. My goodness, my client was at a bar when they met. And have you bother to look at the photos of the outfit she was wearing? Sheer, tight and cut so low you could see everything from here to Iron Mountain! Come on! Every guy there said they'd had sex with her.

"And, this drug issue. You know as well as I do that she had three MIP's as a juvenile and a marijuana conviction just two months ago. Sure she was given a deferred sentence under §7411, But, you know as well as I do that she an addict. This so called 'drugging' was like offering a chain smoker a cigarette!

"And, as for being tied down, are you aware that she goes for S & M big time? She loves being tied down. My client's been told that she's even part of an S & M sex club."

Prosecutor: "Forget it! You can't get that into evidence. Just like I'll probably have trouble showing he's done this twice before. Both those other girls are scared out of their minds. He rapes them, then threatens to kill them if they talk. That's not S & M, that's terrorism! No deal."

If this is on the record in open court, the media will have a field day, the victim will be devastated, and, assuming the case does get to trial, the defendant will be prejudiced by pre-trial publicity.

5. There is also the issue of co-defendants and statements on the record that could seriously jeopardize their rights. Consider:

Prosecutor: "Your client is going to have to plead straight up to B & E, just like we're insisting with the co-defendant, Mr. Smith. He said he's planning to make us go to trial on his case, and as long as we have to, we might as well try your client, too."

Defense Lawyer:	"This isn't fair!"
Prosecutor:	"What do you mean 'not fair'! They both did it, they both go down."
Defense Lawyer:	"No they did not both do it. Remember, my client passed the polygraph on whether he actually went in the building or waited out in the car. Mr. Smith flunked the lie detector test. I was told that Smith was lying so bad the examiner nearly died laughing. Besides, Smith has those five misdemeanor larceny convictions. My guy has a clean record."
Prosecutor:	"No deal."

The polygraph results are not admissible nor are the misdemeanor convictions. Mr. Smith's counsel is not even present. Yet, this is all available to put on the front page of the local newspaper under this proposed change.